

**EXPLANATORY MEMORANDUM TO  
THE PENSIONS REGULATOR (DELEGATION OF POWERS) REGULATIONS  
2009**

**2009 No. 1888**

1. This explanatory memorandum has been prepared by the Department of Work and Pensions and is laid before Parliament by Command of Her Majesty.

This memorandum contains information for the Joint Committee on Statutory Instruments.

2. **Purpose of the instrument**

- 2.1 The purpose of this instrument is to allow the Pensions Regulator to outsource certain of its powers. This is in order to ensure that the compliance regime for the duties on employers (often referred to by the Regulator as the ‘Employer Compliance Regime’, or ‘ECR’) introduced under the Pensions Act 2008 is delivered in the most efficient and cost-effective way.

3. **Matters of special interest to the Joint Committee on Statutory Instruments**

- 3.1 These regulations represent the first exercise of a power (sub-paragraph (1)(e) of paragraph 21 of Schedule 1) which was substituted into the Pensions Act 2004 (the 2004 Act) by the 2008 Act. Paragraph 21(1)(e) contains a more permissive power than what had preceded it. The regulations no longer have to prescribe the circumstances, the persons and the functions to which it delegates specified powers. Rather, these regulations permit the Regulator to authorise such persons, in such circumstances and under such arrangements as it may determine, to exercise on the Regulator’s behalf, (i) the power to determine whether to exercise certain functions, or (ii) the power to exercise certain functions.

4. **Legislative Context**

- 4.1 Section 133 of the 2008 Act amends the existing legislation (contained in Schedule 1 to the 2004 Act) under which the Regulator may delegate its powers to external bodies. The amended legislation sets out the powers that the Regulator can delegate, and the functions to which they apply. These functions are needed for the Employer Compliance Regime, and include for example the power to issue specified notices and penalties. The Secretary of State wishes to make these regulations in order that the Regulator can delegate these powers.

- 4.2 No comment was made in Parliament during the introduction of section 133.

## 5. Territorial Extent and Application

- 5.1 This instrument applies to Great Britain. The Department for Social Development in Northern Ireland will be producing its own legislation replicating these regulations for Northern Ireland.

## 6. European Convention on Human Rights

As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

## 7. Policy background

- *What is being done and why*

- 7.1 The Enabling Retirement Savings Programme (ERSP) is one of the Government's key responses to the challenges facing the UK pensions system. It was set up by the Department in response to two White Papers<sup>1</sup> to implement reforms to increase the number of people saving for retirement and the amount being saved. The ERSP encompasses:

- 7.1.1 the introduction of automatic enrolment into a qualifying workplace pension and a compulsory minimum employer contribution;
- 7.1.2 a compliance regime to ensure employers meet their obligations; and
- 7.1.3 the setting up of a new low cost simple pension scheme - currently referred to as the personal accounts scheme - to ensure all employers have access to a suitable pension scheme in order to meet their new duties.

- 7.2 The Pensions Bill received Royal Assent in November 2008. Chapter 1 of the 2008 Act places a number of duties on employers relating to securing pension scheme membership for eligible jobholders. One of these (section 3) requires employers to automatically enrol eligible jobholders into qualifying workplace pension saving, with a minimum employer contribution. Individuals who decide that they do not want to participate in pension saving have the right to opt out. It is proposed that these reforms will be implemented from October 2012 onwards.

- 7.3 The ability of the Regulator to delegate certain compliance powers (most of which are provided for in Chapter 2 of the 2008 Act) is intended to enable it to meet the new enforcement responsibilities conferred on it under the 2008 Act. It will retain accountability for any functions it chooses to delegate. The 2008 Act gave the Regulator an additional objective to maximise compliance with:

- 7.3.1 the new employer duties, including to automatically enrol all eligible jobholders into a good quality pension scheme; and

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<sup>1</sup> DWP, *Security in retirement: towards a new pensions system*, May 2006 and *Personal accounts: a new way to save*, December 2006

- 7.3.2 the new protections for workers, including the prohibition on inducing opt-out from a qualifying pension scheme (contained in section 54 of the 2008 Act).
- 7.4 The 2008 Act provides the Regulator with powers to take proportionate, graduated compliance action where education and enabling activities fail. Action to combat non-compliance will usually start with warnings followed by a statutory notice and can move to fixed penalties and/or escalating penalties if non-compliance persists. Criminal prosecution will be an option for the most serious cases of wilful non-compliance with key employer duties.
- 7.5 The new employer duties extend the Regulator's responsibilities considerably, and will, for example, require substantial work to handle communication with employers and intermediaries and administer certain aspects of the compliance and enforcement regime.
- 7.6 The ability to delegate powers is consistent with the Government's commitment to ensuring value for money when planning and delivering large-scale public sector projects and to using the skills, expertise and capacity of the private sector where appropriate. The Department generally supports enabling outsourcing where possible and has a history of allowing a range of functions to be contracted out. For example, powers to outsource functions, including enforcement, were given to the Child Maintenance and Enforcement Commission (CMEC) in the Child Maintenance and Other Payments Act 2008, and were also provided for in the Welfare Reform Act 2007.

- **Consolidation**

- 7.7 This instrument does not amend existing instruments that delegate the Regulator's powers. Section 133(6) of the 2008 Act specifically provides that any regulations that have already been made under the previous version of the enabling power for these regulations remain in force, and may be amended for consolidation purposes only.

## 8. Consultation outcome

- 8.1 These regulations were put out alongside the Pensions (Automatic Enrolment) Regulations 2009. The 12-week consultation began on 12 March 2009 and concluded on 3 June 2009.
- 8.2 These regulations are not contentious. There were nine formal responses to the consultation, compared to 79 responses to the consultation on the auto-enrolment regulations, and there has been no media attention. Respondents touched on two broad concerns:
- 8.2.1 *The breadth of the powers to be delegated, which include some 2004 Act powers and the power to review a notice.*  
All of the powers in the regulations will be required to enforce employer compliance. Ensuring that employers make contributions (after either setting up pension schemes or using their existing provision to meet their 2008 Act duties) will be central to the success

of the reforms. Existing powers which can be used to help secure payment of contributions have not been changed by the 2008 Act and will be needed alongside the 2008 Act powers to enforce compliance. The ability to delegate these powers to the same organisation that is delegated the 2008 Act powers will allow for any external provider to take a consistent approach to compliance and for efficiencies in delivering the employer compliance regime.

The right to independent appeal (known as a 'reference') to the Pensions Regulator Tribunal will be retained. This will apply equally to decisions taken by a person to whom the powers are delegated, as to decisions taken by the Regulator itself.

8.2.2 *The flexibility the Regulator will have in delegating powers and the accountability of suppliers.*

The Department is satisfied that the Regulator will have sufficient controls and safeguards in place to ensure that suppliers are accountable. The way in which the enabling power is drafted allows maximum flexibility so that the regulations themselves do not have to contain such controls and safeguards. Instead, such controls and safeguards can be tailored to specific situations by reference to the relevant business rules which will be set by the Regulator.

- 8.3 A more detailed analysis is available in the Government's response to the consultation, copies of which are available on the Department's website at [www.dwp.gov.uk/docs/pen-reg-deleg-powers-gov-response.pdf](http://www.dwp.gov.uk/docs/pen-reg-deleg-powers-gov-response.pdf).

## **9. Guidance**

- 9.1 Guidance will not be issued for these regulations, as they do not directly affect stakeholders.

## **10. Impact**

- 10.1 These regulations do not impact directly on business, charities or voluntary bodies.
- 10.2 These regulations do not impact directly on the public sector but any future use of the delegated powers will depend on the arrangements by which the Regulator chooses to delegate and may therefore result in costs and/or savings.
- 10.3 An Impact Assessment has therefore not been prepared for this instrument. However, the impact of any future use of the delegated powers will be considered.

## **11. Regulating small business**

- 11.1 The legislation does not apply to small business.

## **12. Monitoring & review**

- 12.1 The Enabling Retirement Savings Programme has an evaluation strategy and critical success factors. The Department will review the success of the Regulator's implementation of the Employer Compliance Regime as specified in the evaluation strategy alongside evaluation of the Enabling Retirement Savings Programme as a whole. If any issues with the delivery of the Employer Compliance Regime were to be revealed, the effect of the Regulator using its ability to delegate powers would be considered as necessary.
- 12.2 DWP already has a well developed Stewardship regime in place in relation to the Regulator. This includes a framework document setting out accountability responsibilities and financial controls. DWP signs off the business plans and budgets for the Regulator and conducts quarterly accountability reviews of performance and spend against budget. All contracted-out functions will continue to fall under this stewardship framework. The Regulator's Chief Executive will retain responsibility for agreed objectives and meeting budgets where a power is delegated.

## **13. Contact**

Geraldine Treacher at the Department of Work and Pensions (Tel: 0207 449 7240 or email: [geraldine.treacher@dwp.gsi.gov.uk](mailto:geraldine.treacher@dwp.gsi.gov.uk)) can answer any queries regarding the instrument.